IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DARRELL DUNHAM, Trustee-in-Bankruptcy,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO: 98-CV-0338-PER
	)	(consolidated with 98-CV-0339-PER)
FREDRIC J. KISAK, JOYCE KISAK,	)	
JOHN KISAK, and ANN KISAK,	)	BK. 97-41076/Adv. No. 97-4061
	)	BK 97-41075/Adv. No. 97-4027
Defendants.	)	

MEMORANDUM AND ORDER

RILEY, District Judge:

I. Introduction

Before the Court is an appeal from a February 27, 1998 Order entered by United States Bankruptcy Judge Larry Lessen. This Court has appellate jurisdiction pursuant to **28 U.S.C. § 158(a)(1).** In view of this Court's obligation to accept the Bankruptcy Court's factual findings unless they are clearly erroneous, pursuant to **FED. R. BANKRPT. 8013,** ***Matter of Excalibur Auto. Corp.*****, 859 F.2d 454 (7th Cir. 1988)**, the Court relies heavily on the underlying Bankruptcy Court opinion for a recitation of the facts and procedural aspects of the case (Doc. 35), dealing with contested issues as they arise. The Court, however, reviews conclusions of law *de novo*. ***Calder v. Camp Grove State Bank*****, 892 F.2d 629, 631 (7th Cir. 1990) (citing *In re Longardner & Assocs., Inc.*, 855 F.2d 455, 459 (7th Cir. 1988), cert. denied, 489 U.S. 1015 (1989)).**

II. Procedural History

On September 3, 1996, Frederick J. Kisak ("Fred") and Jerry Lynn Schuttek ("Jerry"),

partners in a joint venture known as Jerred Homecrafters ("Jerred"), filed individual petitions for Chapter 7 bankruptcy relief: *In re Frederic J Kisak*, Case No. 96-41075, and *In re Jerry Lynn Schuttek*, Case No. 96-41075. Trustee Darrell Dunham ("Trustee") filed an adversarial complaint in the Kisak bankruptcy to set aside, transfer and sell certain property bought and developed by Jerred. The Trustee also filed an adversarial complaint in the Schuttek bankruptcy to recover an interest in the same property at issue in the Kisak bankruptcy. The Bankruptcy Court jointly tried the Trustee's claims in the Kisak and Schuttek matters on November 17, 1997. On February 27, 1998, the Bankruptcy Court entered an Order and Opinion denying the Trustee's adversarial complaints in the Kisak and Schuttek bankruptcies. The Trustee now appeals that Order and Opinion. The Kisak and Schuttek adversarial complaints were consolidated on appeal and designated as Case Number 98-CV-0338-PER.

III. Factual Analysis

In 1980, Fred and Jerry Schuttek formed Jerred to buy, develop and sell property. The Trustee contends that the Bankruptcy Court erred in finding that Jerred was a real estate developer. The Trustee, however, does not point to a contrary business purpose. Nor is there any evidence of contrary intentions.

Subsequently, Fred and Jerry, lacking capital of their own, approached John and Ann Kisak ("John" and "Ann"), Fred's parents, for $15,000 to buy building lots in Carterville, Illinois. Although no note or mortgage was signed, the $15,000 was purportedly viewed as a loan. That loan has never been repaid, and John and Ann filed a creditor's claim in that amount on the Kisak bankruptcy estate. On June 14, 1982, with the money from Fred's parents, Jerred acquired by warranty deed from Helen Sutman Lots 9 through 18 in Carterville Milling Company's Addition to the City of Carterville ("the 1982 deed").

In 1988, Jerred constructed a home at 314 South Dent Street, Carterville, Illinois, on Lots 14, 15, and 16 referred to in the 1982 deed ("the subject property"). In the adversarial complaints that are the topic of this appeal, the Trustee seeks to sell the subject property and claim the proceeds as property of the Kisak and Schuttek bankruptcy estates.

Neither party disputes that the house was built for John and Ann, and since 1988 they have been in open, continuous, and exclusive possession. Both parties concede that neither Fred nor Joyce has ever slept in the house, paid taxes on the property, or paid for insurance. The Bankruptcy Court also found that Fred's parents have paid all real estate taxes and insurance on the house, and the subject property is insured in their names. On appeal, the Trustee contends that no evidence was presented that John and Ann paid "all" the real estate taxes. Instead, he states that no taxes were paid in 1988 or 1995, and only partial payment was made in 1989. Conceding that John and Ann paid the real estate taxes in the other years, and not explaining who paid the taxes in 1988, 1989 or 1995, the Trustee has not convinced the Court that the Bankruptcy Court clearly erred in that finding.

The parties also banter over the cost of the house and about whether John and Ann paid for its construction. The Bankruptcy Court, based on John and Fred's testimony, found that John and Ann paid approximately $72,000 for the materials and labor to build the house. The Trustee contends that the Bankruptcy Court clearly erred in its finding of John and Ann's contribution, because nobody could produce records (e.g. checks) of the $72,000. The Court finds the Trustee's arguments unconvincing.

Only two parties could have paid to build the house. Either Fred and Jerry paid out of their own pockets, as Jerred, or John and Ann paid for it. If Jerred financed the construction, they either intended to try to sell the subject property for a profit or gave the house to John and Ann as a gift. John and Ann

moving into the house immediately upon its completion indicates that rather than trying to sell the house on the market and failing, Fred and Jerry built the house for John and Ann. If the house was built for John and Ann, the Trustee would have to present evidence that it was intended as a gift -- something which he has not even suggested. Thereafter, the Bankruptcy Court only heard evidence that John and Ann, and nobody else, paid $72,000 to build the house.

Further, the Trustee cannot succeed on his best evidence objection at trial. **FED. R. EVID. 1002** requires a party seeking to prove the contents of a writing to produce the original writing. In this case, the Trustee argues that Fred cannot prove that his parents paid $72,000 for the house without producing the checks. "An event [however] may be proved by nondocumentary evidence, even though a written record of it was made. **FED. R. EVID. 1002 Advisory Committee Notes; See *Middleby Corp. v. Hussmann Corp.*, 1993 WL 151290 at *14 (N.D. Ill. May 7,1993)**. In this case, Fred is not relying on the checks to prove that his parents paid the $72,000 -- the best evidence rule does not apply. The Court therefore cannot conclude, from the testimony given at trial, that the Bankruptcy Court clearly erred in finding that John and Ann paid the $72,000.

On June 9, 1988, Fred and Jerry in their *individual* capacities, not as Jerred, executed a Quitclaim Deed to John, Ann, Fred and Joyce M. Kisak ("Joyce"), Fred's wife, as joint tenants, conveying right, title, and interest to the subject property ("the 1988 deed"). There was no evidence of consideration given for the 1988 deed. In October 1993 the partnership was dissolved when Fred left Jerred, because injuries prevented him from working in construction at that time. Other than a final tax return, the parties made no attempt to dissolve or wind-up the affairs of Jerred in compliance with Illinois Partnership law.

On February 3, 1994, Jerry and his wife Rebecca executed a quitclaim deed ("the 1994 deed")

on behalf of Jerred, conveying all the lots in the 1982 deed, including the subject property, to Heartland Construction Co. (a partnership between Jerry and Rebecca). Jerry admits on appeal that the 1994 deed erroneously included the subject property previously conveyed in the 1988 deed. No mention was made in the 1994 deed of the house on the subject property. Apparently the 1994 deed was a "self-help" attempt by Jerry to transfer partnership assets to himself and Rebecca. Jerry and Rebecca now disclaim any interest in the subject property.

Subsequently, a lawsuit was filed by Dr. Harryman against Jerred, Fred and Jerry. Joyce, a paralegal at the law firm of Feirich, Mager, Green & Ryan in Carbondale, Illinois, sought advice from an attorney, Mary Lou Rouhandeh, concerning the effect of a potential unfavorable outcome in the litigation on the subject property. Joyce worried that Fred's name on the 1988 deed would expose the subject property, and the house in which John and Ann lived, to a judgment lien. On October 26, 1995, Fred, Joyce, John and Ann executed a quitclaim deed as grantors conveying the subject property to John and Ann as tenants by the entirety and to Joyce as a joint tenant ("the 1995 deed") -- removing Fred's name from the subject property. Joyce disclosed in the Bankruptcy Court that her and Fred's names were on the 1988 deed as an estate planning device to avoid probate. Nobody disputes that intent. All deeds involved in this case were duly recorded with the Williamson County Clerk and Recorder. Fred and Jerry filed for bankruptcy on September 3, 1996.

IV. The Bankruptcy Court Opinion

In the adversarial complaints, the Trustee sought to set aside the 1995 deed as a fraudulent conveyance. The Trustee argued for recovery under § 548 of the Bankruptcy Code, **11 U.S.C. § 548.** Alternatively, the Trustee argued that his "strong-arm" powers as a bona fide purchaser under § 544 of the

Bankruptcy Code, **11 U.S.C. § 544(a)(3),** superseded the rights of John, Ann, Fred and Joyce under the 1988 deed. The Trustee reasoned that because Fred and Jerry conveyed the 1988 deed as individuals, rather than as Jerred (the grantee on the 1982 deed), the 1988 deed was outside the chain of title. Thus, the Trustee maintained, as a hypothetical bona fide purchaser under § 544(a)(3), he attained priority status over the grantees on the 1988 deed (John, Ann, Fred and Joyce).

The Trustee asked for an order permitting the sale of the subject property under **11 U.S.C. § 363(h)**, with the right of the debtors' estates to attach to the proceeds. If the Court ruled in favor of the Trustee with regard to the bona fide purchaser claim, one-half of the interest in the subject property would go to the Kisak bankruptcy estate, while the Schuttek estate would receive the other half (representing their respective 1988 interests in Jerred). If the Court based its ruling on the fraudulent conveyance, the Kisak bankruptcy estate would own a one-quarter interest in the subject property. The Court ruled against the Trustee, and neither estate received anything.

The Bankruptcy Court found that the 1995 deed did not constitute a fraudulent conveyance because, despite his listing as a joint tenant on the 1988 deed, Fred never had an equitable interest in the subject property. Rather, the Court reasoned that because John and Ann paid the entire cost of building the house, supplied the consideration for the 1982 deed, and exclusively resided in the home, Fred only retained a "bare legal title" in the subject property. The Court found that the parties merely contemplated Fred and Joyce as joint owners for estate planning purposes, and that neither Fred nor Joyce thought they had any ownership interest in the property. The Bankruptcy Court concluded that under § 541(d), Fred

had no equitable interest in the subject property, and it was not property of the bankruptcy estate.[1] The Bankruptcy Court effectively preempted the Trustee's fraudulent conveyance claim by holding that he could not claim the subject property as a part of the Kisak bankruptcy estate.

Alternatively, the Bankruptcy Court imposed a constructive trust on the property in favor of John and Ann. The Court reasoned that the Trustee had no claim to the subject property because § 541(d) excludes from the bankruptcy estate property subject to a constructive trust. Finally, the Bankruptcy Court rejected the Trustee's § 544(a)(3) argument, because a potential bona fide purchaser would have constructive notice of the 1988 deed by John and Ann's open and exclusive possession of the subject property.

V. Legal Analysis

A. The Bankruptcy Estate and § 541(d)

"The filing of a petition under Chapter 7 of the United States Bankruptcy Code creates an estate comprised of property described in **11 U.S.C. §541(a)." *In re Foos,* 183 B.R. 149, 155 (Bankr. N.D. Ill. 1995). See *In re Jones,* 768 F.2d 923, 926 (7th Cir. 1985).** The estate, and the Bankruptcy Court's jurisdiction, does not extend beyond a debtor's interest in certain property. ***In re Marrs- Winn Co., Inc.,* 103 F.3d 584, 589 (7th Cir. 1996).** In this case, therefore, the Trustee must claim the subject property as part of Fred's bankruptcy estate. Otherwise, the Court would not have jurisdiction over the Trustee's claim that Fred fraudulently conveyed the subject property in the 1995 deed. If the Court classifies the

[1]The Bankruptcy Court also read § 205/10(2) of the Illinois Uniform Partnership Act, **805 ILCS 205, *et seq.***, together with § 541 (d) of the Bankruptcy Code, to conclude that in 1988 Fred and Jerry conveyed an equitable interest to the subject property.

subject property as part of his bankruptcy estate, and concludes that he fraudulently conveyed it, the estate would receive a one-quarter interest in the subject property.

Under the Bankruptcy Code, Fred could own either a legal interest or an equitable interest in the property. Although a debtor's bankruptcy estate includes "all legal or equitable interests in property as oft the commencement of the case," **11 U.S.C. § 541(a)(1)**, the Code excludes from the bankruptcy estate "any interest in which the debtor holds only bare legal title." ***Marrs-Winn, 103* F.3d at 589**. Specifically, § 541(d) provides,

> property in which the debtor holds, as of the commencement of the case only legal title and not an equitable interest, ... becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d). Section 541(d) "carves out" of the bankruptcy estate equitable interests in property not held by the debtor. ***Belisle v. Plunkett,* 877 F.2d 512, 515 (7th Cir. 1989).**

Section 541(d) was designed "to deal with persons with title to property who sold the equitable interests." ***Id.* at 515-16 (citing S. Rep. 95-989, 95th Cong., 2d Sess. 83-84 (1978), U.S. Code Cong. & Admin News 1978, 5787, 5869, 5870)**. Specifically, through § 541(d), Congress sought to address secondary mortgage markets where a person with titles from many mortgages sells shares in the income stream generated by the notes. ***Id.; In re Tieel*, 876 F.2d 769, 773 (9th Cir. 1989).** A statute's reach, however, is not limited to the impetus for its passage. ***Belisle,* 877 F.2d at 516 (citing *Pittston Coal Group v. Sebben,* 488 U.S. 105, 109 S. Ct. 414, 420-21 (1988)).** The existence of a debtor's "legal" or "equitable" interest in property, and the extent of that stake, arises out of applicable state law. ***Marrs-Winn,* 103 F.3d at 591; *In re Merchants Grain, Inc.*, 93 F.3d 1347, 1352 (7" Cir. 1996); *Jones,***

768 F.2d at 927. Neither side in this case disputes that Illinois law determines Fred's rights in the subject property.

The Bankruptcy Court found that Fred, although listed as a joint tenant on the 1988 deed, had no equitable interest in the subject property. Rather, the Court found that Fred possessed "bare legal title" to the subject property, because john and Ann supplied purchase capital for the land in 1982, they paid for the construction of the house, they exclusively possessed and resided on the premises, and they paid all taxes and insurance on the land. The Bankruptcy Court cited no precedent for its analysis and did not justify its definition of "legal" and "equitable" within the confines of § 541 (d) and Illinois state law.

The distinction between "legal" and "equitable" interests is an anachronism of sorts, inherited from the English practice, pre-dating the American Constitution, of bifurcating the "common law" and "equity jurisprudence." **Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, The Law of Property § 1.5, at 12 (2d ed. 1993).** "Equitable property interests arise, in most cases, as a result of (1) the creation of a trust or (2) the making of a specifically enforceable contract." **Id. at 12-13.** Courts have broadly recognized that the distinction in § 541(d) describes the "classic trust situation" where a trustee holds "bare legal title" to property, and the beneficiaries "hold the equitable title or interest in the trust property [or *res].*" ***U.S. v. Whiting Pools, Inc.*, 462 U.S. 198,205 n.10 (1983); *Marrs-Winn,* 103 F.3d at 589; Foos, 183 B.R. at 156.**

(1) Constructive Trust

Parties may create an "express trust ... by the terms of a will, deed, or other writing," and by fulfilling the legal requirements. ***Kurtz v. Soloman,* 656 N.E.2d 184, 189 (Ill. App. 1995)**. Nobody contends that an express trust exists in this case. The Bankruptcy Court, however, stated that a

"constructive trust" existed with regard to the 1988 and 1995 deeds, precluding inclusion of the subject property in Fred's bankruptcy estate.

A constructive trust, under Illinois law, is an equitable remedy to prevent unjust enrichment, not a real trust. ***American Nat'l Bank and Trust Co. of Rockford v.* U.S., 832 F.2d 1032, 1035 (7th Cir. 1987); Foos, 183 B.R. at 152.** It is "imposed by a court to prevent the unjust enrichment of a party through actual fraud or breach of a fiduciary relationship." ***In re Liquidation of Security Casualty Co.*, 537 N.E.2d 775, 781-82 (Ill. 1989).** A constructive trust arises only when "a court declares the party in possession of wrongfully acquired property as constructive trustee of that property." ***Suttles v. Vogel*, 533 N.E.2d 901, 904 (Ill. 1988)**. The sole duty of the constructive trustee is to transfer property to the rightful owner.

The requirements for a constructive trust are: actual or constructive fraud; a breach of a fiduciary duty; or when duress, coercion or mistake are present. ***Id*. at 904-05**. Under Illinois law, "a constructive trust will not be imposed unless *the complaint makes specific allegations of wrongdoing." Id.* **at 905 (emphasis added).** The constructive trust remedy is completely inapplicable to this case. Nobody alleges wrongdoing. No one alleges that Fred breached any fiduciary duty. The Bankruptcy Court found that because any attempt by Fred or Jerry "to assert dominion or control over the subject property after [1988] would *have been* wrongful," Fred and Jerry were merely constructive trustees of John and Ann's interest in the property (Bankr. Ct. Op. at 8) (emphasis added). The Court thereafter reasoned that under § 541(d), Fred had an unreachable "bare legal interest" in the subject property. This Court simply finds no basis in law or fact for the Bankruptcy Court's finding of a constructive trust. Further, even if this Court could justify imposing a constructive trust, it is far from clear that the Bankruptcy Court could impose such

a remedy under the Bankruptcy Code. **See *Foos*, 183 B.R. 149 (holding that unless a pre-bankruptcy judgment imposed a constructive trust, a bankruptcy court would upset the statutory priorities of creditors by granting such relief).** The Court reverses the Bankruptcy Court's holding on the constructive trust issue.

(2) Resulting Trust

Alternatively, Fred argues on appeal that the Court should impose a "resulting trust" on the subject property. In contrast to a constructive trust, "a resulting trust, like an express trust, comes into being independent of any judicial action," and it arises, if at all, at the time that legal title vests. ***Id*. at 159 (citing *First Nat'l Bank & Trust Co. of Rockford v. Illinois Nat'l Bank & Trust* Co. of *Rockford*, 167 N.E.2d 223, 225 (111. 1960)).** "A resulting trust, unlike a constructive trust, seeks to carry out a donative intention rather than to thwart a wicked scheme." **American Nat'l Bank and Trust Co. of Rockford, 832 F.2d at 1035.** It may arise as a matter of law where one person furnishes consideration to buy property but title is placed in another's name. ***Treschak v. Yorkville Nat'l Bank*, 604 N.E.2d 1081, 1083 (Ill. App. 1992); See, e.g., *In re Estate of Wilson*, 410 N.E.2d 23, 26-27 (Ill. 1980); *Matter of McGee's Estate*, 383 N.E.2d 1012, 1015 (Ill. App. 1978).** In such a case, regardless of the designation on the deed, the Court imposes a resulting trust in favor of the party to whom the benefit of the property was intended -- often the source of funding. ***Treschak*, 604 N.E.2d at 1083.** The party with the beneficial interest takes the full equitable interest. Resulting trusts arise from courts of equity and reflect the belief that "one who pays for the property should enjoy it, unless he intended by the vesting of title to confer a beneficial interest on the grantee." ***In re Estate of McCormick*, 634 N.E.2d 341, 345 (Ill. App. 1994).**

A Court exercising bankruptcy jurisdiction may declare a resulting trust, because "the intent of the parties at the time of the conveyance is controlling." ***Treschak*, 604 N.E.2d at 1083.** Unlike the constructive trust in **Foos**, a resulting trust does not re-order the statutory priority of creditors' claims, because it pre-dates the bankruptcy proceedings and is implied by the intent surrounding the original transaction. **See *In re Sacramento Real Estate Corp.*, 201 B.R. 225, 233 (Bankr. N.D. Ill. 1996).** In Illinois, the person claiming the existence of a resulting trust must establish, by clear and convincing evidence, the designs of the person who furnished the purchase price at the time of the conveyance. ***McCormick*, 634 N.E.2d at 345.** Once proven, a rebuttable presumption of resulting trust arises, and the burden shifts to the opposing party to prove entitlement. ***Sacramento*, 201 B.R. at 233.**

In ***Treschak*, 604 N.E.2d at 1082-83,** a son had furnished full consideration for a house in which he lived. His father was listed as a joint tenant on the title, because the son was a minor at the time of purchase. ***Id.*** The son argued for a resulting trust in his favor as the sole intended beneficiary. ***Id.*** The Court noted the well-established rule that a deed unconditionally listing two family members as joint tenants, with only one family member providing consideration, raises a presumption that a gift is being made of one-half legal title and beneficial interest in the property to the non-paying party. ***Id.* at 1083 (citing *Forlenza v. Forlenza*, 256 N.E.2d 42 (Ill. App. 1970)).** The Court stated, however, that this presumption collapses upon "clear, convincing,

and unmistakable evidence" that no gift was intended. ***Id.* at 1083-84.** The *Treschak* court found that the son carried that burden and declared a resulting trust with him as the beneficiary and holder of the equitable interest in the property.

In a slight twist from the situation in ***Treschak***, Fred, the non-payer, wants the Court to declare

a resulting trust in his parents' favor. Doing so would vest in Fred and Joyce a "bare legal interest," not encompassed within the bankruptcy estate under § 541(d), rendering John and Ann holders of the full equitable interest under the 1988 title. Fred presented evidence that his parents paid for the subject property in 1982, paid for the construction of the house, paid and continue to pay all real estate taxes and insurance costs, and exclusively occupy the subject property. Under Illinois law, however, "evidence that the parent grantor pays the maintenance costs of the property and occupies or exercises dominion over the property after transfer of title has been held in several cases not to negate the presumption of a gift or an advancement to a child grantee." ***McCormick,* 634 N.E.2d at 345 (emphasis added) (citing *Moore v. Moore,* 138 N.E.2d 562 (Ill. 1956); *McCabe v. Hebner,* 102 N.E.2d 794 (Ill. 1951); *Koh1hass v. Smith,* 97 N.E.2d 774 (Ill. 951)).**

The additional factor allowing for a resulting trust in ***Treschak,* 604 N.E.2d at 1084,** "[was] that it was intended at the time of the purchase that the [son] would have the entire equitable interest of the property." In this case, as the only evidence of intent sufficient to rebut the presumption of a gift, Fred points to the uncontested testimony that John and Ann placed Fred and Joyce on the 1988 deed as an estate planning device to avoid probate.

The central issue for the Court then becomes whether John and Ann's intent that Fred and Joyce not exercise dominion over the subject property during John and Ann's lifetime suffices to rebut the legal presumption that the joint tenancy was a gift - allowing the Court to infer a resulting trust in favor of John and Ann. The Court must harken back to the dusty case of ***Partridge v. Berliner,* 156 N.E. 352 (Ill. 1927)**, to answer that question.

In ***Partridge, 156* N.E. at 353**, Edward Applegate paid full consideration for three parcels of real

estate between 1915 and 1921. In each instance, he directed the deeds issue to himself and his wife, Lavinia A. Applegate, as joint tenants.[2] ***Id***. The court noted that the sole reason for Edward placing his wife on the deed was to avoid probate and to insure that she would right of survivorship in the property. ***Id***. The court further construed Edward to intend that he retain full control during his lifetime. ***Id.*** **("the only right his wife was to have was the survivorship").** After stating the law on resulting trusts and the presumption of a gift in joint tenancy -- identical to present standards -- the court stated:

> A joint tenancy is a present estate in all joint tenants ... Applegate did not intend that his wife should have any present estate ... He wanted to have entire control of the property and that it should be his as long as he lived ... The deed, therefore, was to convey no estate during his lifetime, for he was to have entire control and be the owner as long as he lived.

Id. **at 353-54**. Taking a different tack, however, the court stated that Lavinia did not receive a gift because a joint tenancy never existed. ***Id.*** **at 354**. The court reasoned that Edward's "incorrect" conception of the legal effect of a joint tenancy, that no present interest vested in his wife, indicated that he actually intended to create a "conventional trust." ***Id.*** The court declared the Applegates as "joint trustees"in the deed, with Edward enjoying the entire beneficial interest during his life.

Similar to the facts in the ***Partridge*** case, John and Ann paid for the subject property and have retained sole dominion over the house. Further, like ***Partridge***, nobody disputes that the parties solely intended for Fred and Joyce to hold a joint tenancy in the subject property so that they could avoid probate and insure survivorship. The Court in this case adopts the reasoning of the ***Partridge*** court and finds the parties did not intend for Fred and Joyce to gain a present interest in the subject property. Unlike

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[2]Lavinia was subsequently adjudged insane and committed to Elgin State Hospital.

the ***Partridge*** court rationale, however, this Court finds that having proven their sole motives as survivorship, and not to convey a present interest, the parties have sufficiently rebutted the presumption that John and Ann intended the joint tenancy as a gift to Fred and Joyce. A resulting trust exists in favor of John and Ann, and Fred and Joyce hold no equitable interest in the subject property under the 1988 deed. Further, the 1988 deed was not fraudulently conveyed to protect the subject property from creditors, which would preclude a resulting trust. ***American Nat'l Bank and Trust Co. of Chicago v. Vinson,* 653 N.E.2d 13, 15 (Ill. App. 1995).** Under § 541(d) of the Bankruptcy Code, therefore, the subject property is not included in Fred's bankruptcy estate and not subject to the Trustee's fraudulent conveyance claim.

While adopting the ***Partridge*** court's reasoning to declare a resulting trust, this Court does not find a conventional trust. In Illinois, a written express trust in property is created by the terms of a will, deed, or other writing. ***Kurtz,* 656 N.E.2d at 189.** Alternatively, the parties bear the burden of proving an oral express trust "by clear and convincing evidence." ***Id.*** "The acts or words supporting a claim of an oral express trust must be so unequivocal as to lead to only one conclusion; if evidence is doubtful or capable of reasonable explanation on any other theory, it is insufficient . . . ." ***Id.* at 189-90.** The 1988 deed does not provide terms for an express trust, and the evidence presented at trial in the Bankruptcy Court better supports a resulting trust than an oral express trust. No evidence exists that the parties intended an oral express trust. Rather, John and Ann intended themselves as sole holders of the present and beneficial interest in the subject property. Fred and Joyce were intended as "bare legal title" holders. Illinois law dictates a resulting trust in favor of John and Ann, entitled to the full equitable interest, for the subject property.

Finally, the Court finds that the Trustee's citation to ***In re Teranis,* 128 F.3d 469 (7th Cir. 1997)**,

does not avail him. ***Teranis*** involved facts similar to the present case. The court in ***Teranis***, however, applied Wisconsin law and narrowly based its holding on an interpretation of two Wisconsin state court cases on co-equal ownership in joint tenancies. ***Id***. The case also does not bind this Court because the Seventh Circuit did not address Illinois law on resulting trusts. ***Id***.

The Court upholds the Bankruptcy Court's ruling on different grounds - that under § 541(d) the subject property is not part of Fred's bankruptcy estate, and therefore the Trustee cannot claim it as a fraudulent conveyance. The Court need not address the Bankruptcy Court's finding as to whether the 1995 deed amounted to a fraudulent conveyance under § 548 of the Code.

B. The Trustee's Strong-Arm Powers Under § 544(a)(3)

In the alternative to his fraudulent joinder claim, the Trustee argues that § 544(a)(3), commonly known as the strong-arm clause, allows him to preempt the 1988 deed, leaving each of the partners in Jerred, the estates of Fred and Jerry, a one-half interest in the subject property. The Trustee reasons that because the 1982 deed was issued to Jerred, as the sole grantee, and Jerry and Fred individually were grantors on the 1988 deed, the 1988 deed fell outside the chain of title, allowing the Trustee, as a bona fide purchaser, to take the subject property ahead of the grantees on the 1988 deed.

Section 544(a)(3) of the Bankruptcy Code provides that:

> The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of the debtor or any obligation incurred by the debtor that is voidable by – . . .
>
> (3) a bona fide purchaser of real property from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such purchaser exists.

11 U.S.C. § 544(a)(3). Section 544(a)(3) places the Trustee in the shoes of a hypothetical bona fide

purchaser at the commencement of the case. The powers of a bona fide purchaser under § 544(a)(3) are "defined by state law." ***Tleel,* 876 F.2d at 772. See *Belisle,* 877 F.2d at 514.** In Illinois, a person qualifies as a bona fide purchaser and takes free of any interest of third persons by getting title to real property "in good faith for value without notice of outstanding rights or interests of others." ***BCGS, L.L.C. v. Jaster,* 700 N.E.2d 1075, 1083 (Ill. App. 1998) (internal quotations omitted) (quoting *Daniels v. Anderson,* 642 N.E.2d 128 (Ill. 1994)).**

In this case, the Trustee specifically argues that a hypothetical bona fide purchaser would not have notice of a defect in title or of John and Ann's rights in the subject property. A person may have actual, constructive, or inquiry notice of defect in title. ***Equitable Real Estate* Investments v. U.S. Dept. of Housing and Urban Development, 14 F. Supp. 2d 1058, 1062 (N.D. Ill. 1998).** Illinois obligates a purchaser of land to examine the record of the chain of title and charges that person with notice of any information contained therein. ***Id.* (citing *Clark v. Leavitt,* 166 N.E. 538,539 (Ill. 1929)).** Additionally, "one having notice of facts which would put a prudent man on inquiry is chargeable with knowledge he might have discovered by diligent inquiry." ***Id.* (internal quotations omitted) (quoting *Smith v. Grubb,* 84 N.E.2d 421, 428 (Ill. 1949)).** The language in § 544(a), stating that the provision operates "without regard to any knowledge of the trustee," does not affect the notice obligations of a bona fide purchaser under 544(a)(3). ***Belisle,* 877 F.2d at 514 n.2 (citing *McCannon v. Marston,* 679 F.2d 13, 16-17 (3rd Cir. 1982))**.

Without deciding whether the 1988 deed passed outside the chain of title, the Court finds that Illinois law would place any potential purchaser of the subject property on constructive notice of John and Ann's interest by their continuous, open and exclusive possession. ***Id.; American Nat'l Bank,* 653**

N.E.2d at 16. With regard to the 1988 deed, therefore, the Trustee may not assume the status of a bona fide purchaser, stripping him of his strong-arm powers under § 544(a)(3)). Neither Fred nor Jerry's bankruptcy estate has any interest in the subject property. The Court upholds the Bankruptcy Court's ruling in this regard.

VI. Conclusion

The Court upholds the Bankruptcy Court's denial of the Trustee's adversarial complaint. Neither the Kisak bankruptcy estate, *In re Frederic J. Kisak,* Case No. 96-41075, nor the Schuttek bankruptcy estate, *In re Jerry Lynn Schuttek,* Case No. 96-41075, has any property rights in 314 South Dent Street in Carterville, Illinois.

IT IS SO ORDERED.

DATED this 16th day of December, 1998.

/s/ PAUL E. RILEY
United States District Judge